INDEX

	Page
Cases:	
Cities Service Co. v. *State Comm. of Kansas*, 355 U.S. 391	10
Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581	9
Frozen Food Express v. *United States*, 351 U.S. 40	2
Permian Basin Pipeline Co. v. *Railroad Commission of Texas*, 358 U.S. 37	9
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	9, 10
Statutes:	
Kan. Gen. Stat. (1949):	
§ 55–703	2
§ 55–708	2
Miscellaneous:	
Kansas State Corporation Commission Orders:	
Order of October 8, 1958	6
Order of April 22, 1959	7
Order of November 10, 1959	7–8
Kansas State Corporation Commission, *Twenty-Fourth Biennial Report*, pp. 213, 215, 216, 218, 219–220	4–5

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 659

NORTHERN NATURAL GAS COMPANY, A CORPORATION, APPELLANT

v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

This memorandum, on behalf of the Federal Power Commission as amicus curiae, is filed in response to this Court's order of March 19, 1962 (369 U.S. 814). We support the view that the Court should note probable jurisdiction.

The present appeal has been taken from judgments of the Kansas Supreme Court,[1] upholding an order and rule of the Kansas Corporation Commission. The order and rule direct appellant, an interstate pipeline company subject to federal regulation under the

[1] There is a preliminary question as to reviewability not raised by the parties. The appeal is taken from two decisions of the Kansas Supreme Court, Nos. 42127 and 42128. The jurisdictional statement, at p. 3, indicates that the Kansas Commission, when it promulgated the general rule which is the subject of

Natural Gas Act, and all other purchasers in the Kansas-Hugoton gas field to take gas ratably, *i.e.*, in proportion to allowable production,[2] from every well to which each purchaser is connected in the field. It is the view of the Federal Power Commission that State action of the kind here involved exerts leverage upon interstate pipelines to purchase natural gas from one State rather than another. The action therefore enters into the field occupied by the Natural Gas Act and is invalid under the Supremacy Clause. The questions are substantial and warrant plenary consideration by this Court.

1. The entire Hugoton field (which extends also into Oklahoma and Texas) constitutes a single source of supply. None of the purchasers is required by the Kansas Commission to take ratably with any other, however; nor is there any coordination among the States involved. The requirement is that each purchaser in Kansas take ratably among its own connections within that State.

Annexed to this memorandum is a map of the entire

No. 42127, rescinded the order in No. 42128, which was directed solely to appellant. For that reason, No. 42128 appears to be moot. The same facts and questions are present in No. 42127, however. Since the rule carries criminal sanctions (Kan. Gen. Stat. § 55-708 (1949)), and since its applicability to appellant is not questioned, No. 42127 appears properly reviewable here. See *Frozen Food Express* v. *United States*, 351 U.S. 40. Nevertheless, since the decision of the Kansas Supreme Court in No. 42127 relies on the opinions in No. 42128 for a development of the facts and reasoning (J.S. App. xxxiv), the opinions in No. 42128 are relevant.

[2] The Kansas Commission, by order, limits the production of gas wells in Kansas for the stated statutory purposes of preventing unfair taking from a common source of supply and of preventing waste. See Kan. Gen. Stat. § 55-703 (1949). See also *infra*, p. 4, *et seq.*

Kansas portion of the field, which shows, with respect to each section, the pipeline or pipelines with which the wells in that section are connected. The connections of each pipeline are interspersed with those of others in such high degree that differences in rates of take between one pipeline and another must necessarily result in drainage; that is, when gas is taken at any particular rate from the wells attached to one purchaser's line, gas will flow underground toward those wells from any neighboring area—be it local or regional—in which the wells are being operated at a lower rate. With wells closely interspersed, the inevitable effect of differences in the rates of take is drainage from one to another.

In fact, in the present case, there appear to be substantial differences in the rates of take among the various purchasers in the Kansas-Hugoton field. The Kansas Commission's gas proration orders and reports show that the takes of the six leading purchasers, expressed as percentages of the allowable production of the wells with which they are connected, varied in 1961 from 81.58% to 96.43%. The year 1960 showed a comparable range, although various purchasers occupied different relative positions. Thus, the Kansas Commission's order and rule do not protect the correlative rights of adjacent landowners, but actually enforce differences in the level of purchases among neighboring wells, depending on (1) the pipeline to which the well is connected and (2) the total purchases which that pipeline happens to make in any given period; the order and rule freely tolerate inequalities in the pipelines' several rates of purchase and thereby permit continued drainage from groups of wells to neighboring groups.

2. The orders of the Kansas Commission, by requiring each pipeline to take ratably from all of its connected suppliers in the Kansas portion of the field, are calculated to make the highest rate of take, required by any of its suppliers' contracts, the floor for all purchases by that pipeline, and thereby constrain interstate pipelines to buy more gas from Kansas sources. The course of regulation by the Kansas Commission during the last several years confirms this view.

On January 22, 1958, the Commission issued a report and order changing its method of fixing allowables. Kansas State Corporation Commission, *Twenty-Fourth Biennial Report*, p. 213. Theretofore, the nominations by purchasers from the Kansas-Hugoton field of the amounts they expected to purchase during the ensuing six-month period had been considered by the Commission to be the market demand for the field (*id.* at p. 216). Stating that the Oklahoma portion of the reservoir was being depleted approximately twice as fast as the Kansas portion and the Texas portion at an even higher rate (with consequent drainage to those states from Kansas) (*id.* at p. 215), the Commission decided that, in determining market demand in the future it should consider, in addition to the nominations by purchasers, the following factors (*id.* at p. 218):

> (1) Takes from other sources of supply to which the purchasers are connected.
>
> (2) The total markets for natural gas of all purchasers from the Kansas-Hugoton Field; the rate of increase therein compared to the

rate of increase in the takes from the Kansas portion of the Hugoton Field.

The concurring opinion of Chairman Beatty emphasized the objective of increasing Kansas production at the expense of Oklahoma (*id.* at pp. 210–220):

> Intervenors have urged us to continue the practice of setting high monthly allowables which was started by the Commission in April, 1956. They have asked us to increase the allowables 25% more even though the Commission since April, 1956, has been allowing somewhat more than the market actually absorbed. This benefited pipe line companies in need of gas, usually those overproduced. It was coercive on those who did not have proportional markets, those usually underproduced. It has not been effective so far, but if and when it has the intended effect of forcing higher takes, it will allow the producers and royalty owners to convert their minerals into cash more quickly. The only visible results in the last nineteen months, however, have been no increase in takes and a gradually mounting net underage. The net allowable is now 52 million M.c.f. higher than the amount that will be actually taken and marketed this month, but if it is carried for awhile, the pipe line companies may find a market for it.
>
> * * * * *
>
> I am most heartily in favor of Kansas resources being harvested and marketed by Kansas people and Kansas industries, rather than by Oklahomans, and my sympathies are with the Kansas royalty owners, some of whom have had to sell their birthright to the pipe line

> companies for a mess of pottage (as low as 3¢ to 8¢ per M.c.f.) and are now having the pottage rationed to them in small spoonfuls, but whether we, a conservation commission, should try to force the sale and depletion of our natural gas at today's low prices, raises another question. Gas is a most desirable fuel. America's reserves of natural gas are being depleted one hundred times faster than our coal reserves. Aside from the question of our authority and jurisdiction to execute such a program under present conservation statutes, such a program may, in retrospect, prove to be very unwise, considering the welfare of the state as a whole.

Notwithstanding the recognition that the mere raising of the allowables had "not been effective so far," the Kansas Commission continued to consider factors other than the purchasers' nominations in determining the "market demand," on which allowable production from the Kansas-Hugoton field has been based. Thus, in its order of October 8, 1958,[3] determining market demand for proration purposes, the Commission found that the pipelines' nominations totalled 238,634,540 Mcf for the six months ending March 31, 1959, and that this total was lower than the nominations for the same periods of the two preceding years. It found that "the consumptive market of the purchasing pipeline companies has increased" since March 31, 1958, and noted evidence that—

[3] This and other pertinent orders discussed *infra* are in the files of the F.P.C. and will be made available to the Court, should it so desire.

> * * * if the five largest purchasers (purchasing pipeline companies) would take gas from the Kansas Hugoton Gas Field at the same rate based on comparative gas reserves as they now do from the other sources to which they are connected, the Kansas Hugoton Gas Field's fair share of the markets would be 676,904,000 Mcf for the twelve months' period. This indicates that the market demand for the next six months would be approximately 430,000,000 Mcf. * * *

The commission ultimately fixed total allowables for the six-month period at 255,000,000 Mcf.

In a similar order, dated April 22, 1959, fixing allowables for the six months from April 1 to September 30 of that year, the Kansas commission again found that the pipelines' nominations of 169,413,250 Mcf did not reflect the "fair market demand" for the Kansas-Hugoton field. Evidence showed that, if the five largest purchasers took gas from that field at the same rate relative to reserves as from their other connections, the field's share would be 241,519,000 Mcf. Evidence also showed that the Kansas-Hugoton reserves of the four leading purchasers amounted to 44% of their total reserves, but that these companies were supplying only 23% of their over-all markets with Kansas-Hugoton gas. Although evidence as to drainage of gas from Kansas into Oklahoma was conflicting and inconclusive, the total allowables were fixed at 175,000,000 Mcf, or 5,586,750 Mcf above the pipelines' nominations.

In another order, dated November 10, 1959, fixing

allowables for the six months to March 31, 1960, the Commission said:

> Nominations and runs are often controlled or influenced by contracts between the producers and purchasers. These contracts do not necessarily bear any relationship to the market demand for gas from the Kansas Hugoton Gas Field or any gas field, and they are not binding upon the Commission in carrying out its regulatory duties.

In each subsequent proration order, the "market demand" has been based on considerations similar to those stated in the orders discussed above, and each time allowables have exceeded the nominations of the pipelines. Each order has contained findings that the Commission is not bound by the contractual relationships between producers and purchasers; that the Kansas-Hugoton field is not getting its fair share of the purchasers' markets; and that purchases have been lower, in proportion to reserves, in Kansas-Hugoton than over-all.

The ratable-take order here involved supplied the element that was missing in the Kansas Commission's previous attempts to force more Kansas gas into the interstate market by merely raising the allowables, or ceilings. The ratable-take order involved in the present case, in effect, established a floor for each purchaser by requiring him to take from all his connected wells at the highest rate at which he was obligated to take from any of them. Under the order, Northern will be required to take the same percentage of the allowable for each connected well that it is required

to take from the "Republic 'A' " wells under its contracts with that supplier. Northern will therefore presumably have to increase substantially its rate of take from its other suppliers in Kansas and reduce its take from its suppliers in other states.

3. From the foregoing, it is evident that the order and rule here in issue do not regulate such matters as "the drilling and spacing of wells" (*Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 603), or "the physical activities, facilities, and properties used in the production and gathering of natural gas" (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678)—subjects which are concededly within the control of the States. Nor does it appear that *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 358 U.S. 37, on which appellee relies, is apposite. That case concerned a field located wholly within a single county in Texas, and involved the proper allocation of production within the county so as to prevent discrimination among producers on the part of the owner of the only available gas processing plant. The total amount of gas flowing into interstate commerce was not in issue; nor was its price affected by the order there under review.

On the other hand, the order and rule here in issue directly affect the relative volume or amounts of gas being sold in interstate commerce by the several States. Moreover, to the extent that the Kansas Commission's action constrains interstate pipelines to alter their takes of gas from different wells—both

those located in Kansas and those located in other States—the action has direct impact upon the cost of gas to the pipelines and to the ultimate consumers.[4] See *Phillips Petroleum Co.* v. *Wisconsin, supra,* 347 U.S. at 685; *Cities Service Co.* v. *State Comm. of Kansas,* 355 U.S. 391.

To acknowledge that drainage knows no State lines and that Kansas may have cause for concern when production in adjoining States from this multi-state reservoir occurs at a more rapid rate than production in Kansas does not mean that each of the several States is empowered to adopt measures which exert leverage upon interstate pipelines to take increased quantities from that State. If each State did that, interstate pipelines might well be required to take and pay for more gas than they can sell—a consequence which would obviously place heavy burdens upon interstate commerce. It is not our purpose in this memorandum to attempt to explore all of the ramifications of

[4] Because the pipelines' obligations to deliver gas are of long duration, they must ordinarily make long-term contracts with their suppliers to assure themselves of adequate reserves and deliverability. Kansas-Hugoton is one of this country's older fields, though it still contains large reserves. Contracts in more recently developed areas, including the Oklahoma portion of the Hugoton field, frequently provide for minimum takes by the pipeline. Northern's "Republic 'A'" contract and most of its contracts outside of Kansas (but not its other Kansas-Hugoton contracts) contain minimum-take provisions. To the extent that the actions of the Kansas Commission divert appellant's purchases from suppliers whose contracts so provide, whether in Kansas or elsewhere, the actions expose appellant to contract penalties which affect the unit price of the gas it buys.

a complex problem in federal-state and interstate relationships, but, rather, to point out that the present case raises issues of a quite different order from those presented in the cases cited above. The questions, in our view, are substantial and warrant full review by this Court. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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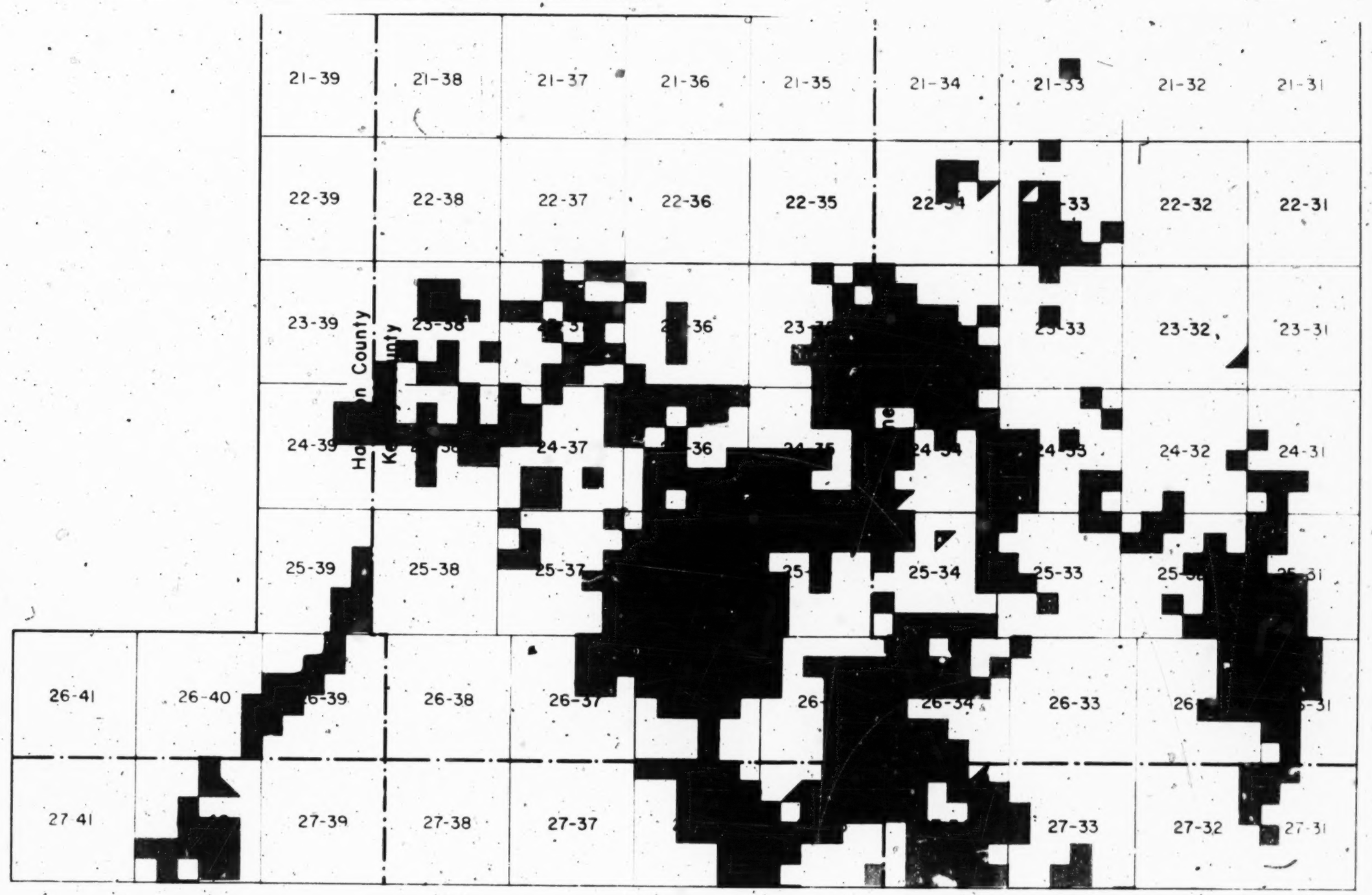
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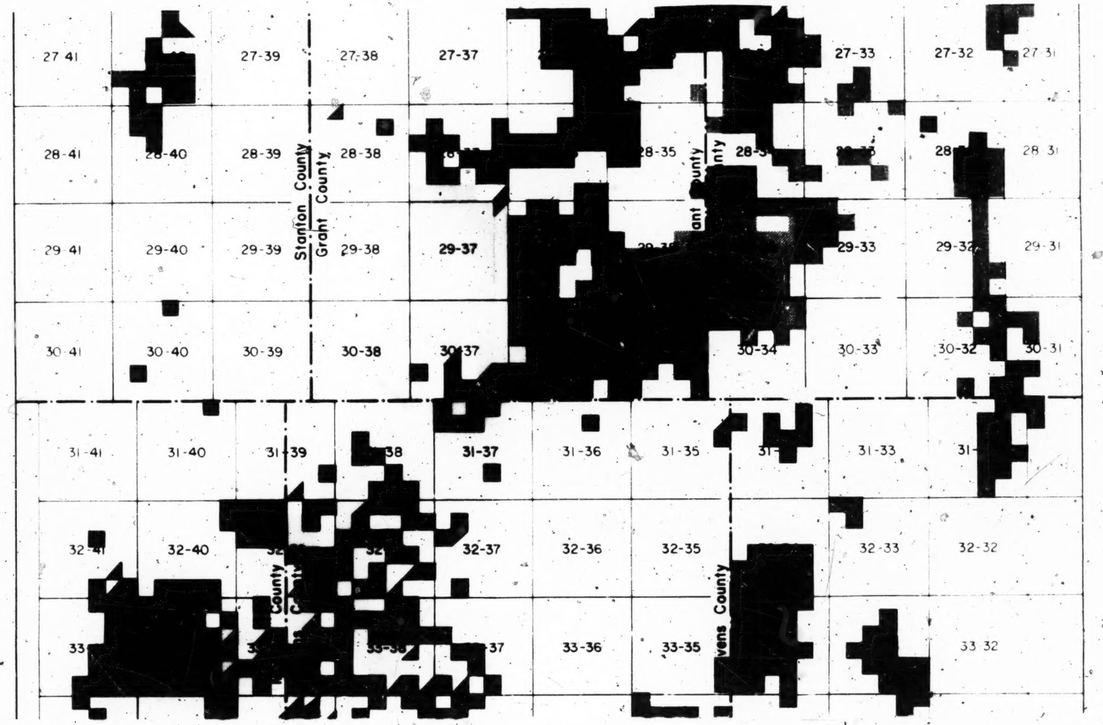
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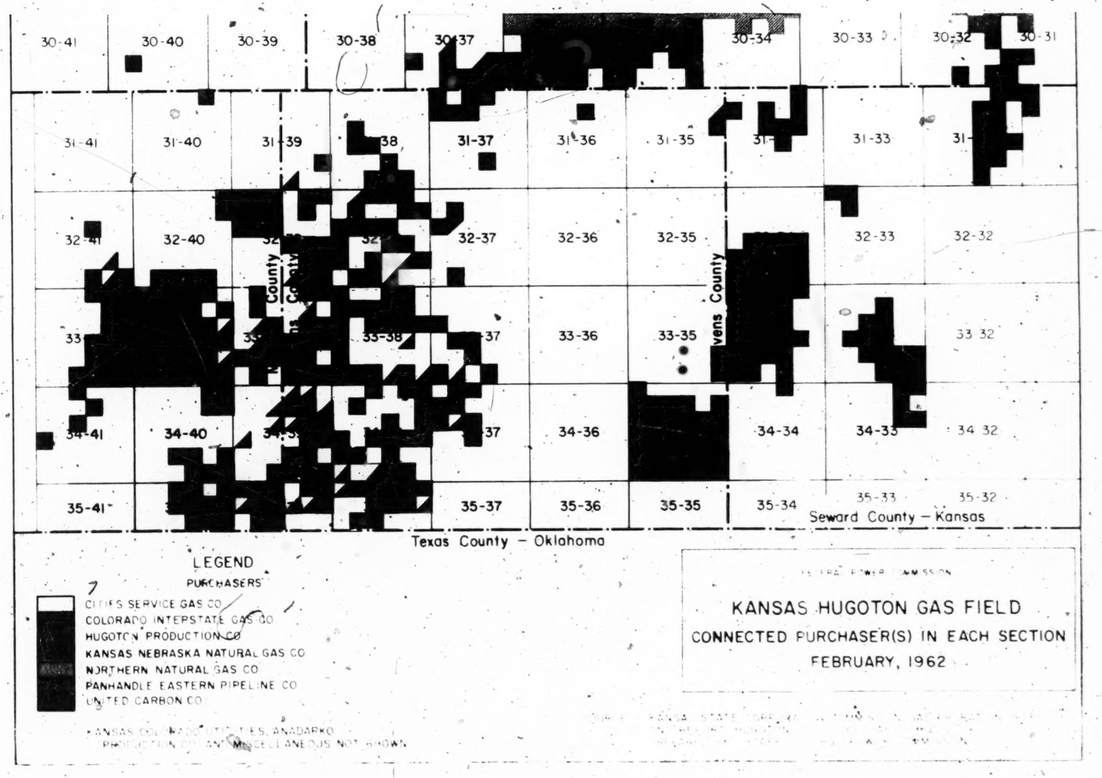
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Texas County – Oklahoma
Seward County – Kansas
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COLORADO INTERSTATE GAS CO.
HUGOTON PRODUCTION CO.
KANSAS NEBRASKA NATURAL GAS CO.
NORTHERN NATURAL GAS CO.
PANHANDLE EASTERN PIPE LINE CO.
UNITED CARBON CO.
KANSAS CORPORATION COMMISSION
KANSAS HUGOTON GAS FIELD
CONNECTED PURCHASER(S) IN EACH SECTION
FEBRUARY, 1962